Nos. 22397-22398A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22397

UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA PORTLAND CEMENT COMPANY, a corporation, Successor-in-Interest to ARIZONA PORTLAND CEMENT COMPANY, a corporation,

Appellee.

No. 22397-A

CALIFORNIA PORTLAND CEMENT COMPANY, a corporation, Successor-in-Interest to ARIZONA PORTLAND CEMENT COMPANY, a corporation,

Cross-Appellee,

vs.

UNITED STATES OF AMERICA,

Cross-Appellant.

No. 22398

UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA PORTLAND CEMENT COMPANY,

Appellee.

No. 22398-A

CALIFORNIA PORTLAND CEMENT COMPANY,

Cross-Appellant,

vs.

UNITED STATES OF AMERICA,

Cross-Appellee.

Closing Brief for California Portland Cement Company.

MUSICK, PEELER & GARRETT,
JOSEPH D. PEELER,
STUART T. PEELER,
PETER C. BRADFORD,
One Wilshire Boulevard,
Los Angeles, Calif. 90017,
Counsel for California Portland Cement Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Closing Brief for California Portland Cement Company.

The Government's closing brief provides an excellent illustration of the reasoning by which it ignores seven years of prior litigation, the purpose of the depletion computation, and the pertinent authorities.

A. The Alleged Untimeliness of California Portland's Cross-Appeals.

The judgments of the District Court became final on July 31, 1967. The Government appealed on September 28, 1967 and California Portland cross-appealed on October 6, 1967.[1] In its closing brief, the Government alleges that California Portland's notices of appeal "may" have been untimely.[2] In making this allegation, the Government entirely disregards FED. R. CIV. PROC. 73(a) which specifically provides:

> ". . . (3) if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed. . . ."[3]

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[1]C.P.C. Op. Br. 2, nn. 1-3.

[2]Gov't. Cl. Br. 2 (n. 2), f. 6.

[3]The Government's citation of 28 U.S.C. §2107 is misleading. Prior to the 1966 amendments to the Federal Rules, the appeal period for both parties where the United States was a litigant was 60 days. 7 MOORE, FEDERAL PRACTICE 3125 (1966). Section 2107 of Title 28, U.S.C., enacted in 1948, reflected this rule. From the date of enactment of the Federal Rules, however, the law has been that each time a new Federal Rule is promulgated, conforming changes will not necessarily be made in the Judicial Code or other applicable statutes and, in case of conflict, the revised Federal Rule will supersede a prior inconsistent statute. The purpose of this is to avoid the burden of amending all pertinent statutes each time a Federal Rule is enacted or amended, and to avoid confusion in case all of the relevant statutes are not amended each time a Federal Rule is changed. See MOORE, *supra,* vol. 2 pp. 128-31, vol. 7A pp. 22-23. Accordingly, the Government is completely unjustified in suggesting that a prior statute controls the 1966 amendment to Federal Rule 73(a). See 28 U.S.C. §2072; *McConville v. United States,* 197 F.2d 680, 682 (2d Cir. 1952).

B. The Government's Procedural Attempt to Avoid Collateral Estoppel.

The Government next alleges that the "primary" contention in our opening brief is that it is collaterally estopped from its present relitigation, that we have presented our collateral estoppel argument by cross-appeal, and that this argument was not preserved in our notices of appeal.[4]

Of our total opening argument of 60 pages, 17 pages concerned collateral estoppel and 43 pages were devoted to the merits. As therein clearly stated, our position is that the District Court's judgment is supported by both collateral estoppel and the merits, and that either analysis compels affirmance.[5]

In addition, our opening brief also makes it clear that we do not present the collateral estoppel argument by cross-appeal.[6] We do not seek to change a single particular of the District Court's judgment on this ground, but instead contend that collateral estoppel supports that judgment in all respects. It is hornbook law that an appellee may raise any legal argument in support of the judgment of the trial court, regardless of whether such argument was relied upon or even considered by the court below. E.g., *White v. Higgins*, 116 F.2d 312, 318 (1st Cir. 1940).

Along with its disregard of our brief, the Government again ignores Federal Rule 73 which provides: ". . . (b) the notice of appeal shall . . . designate *the judgment* or part thereof appealed from. . . ."

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[4]Gov't. Cl. Br. 3, 4, 6.

[5]See, e.g., C.P.C. Op. Br. 6-7.

[6]E.g., *id.* at 5-6.

(emphasis added) Here, the judgment of the District Court applied the exact depletion computation developed in the 1951-52 Case[7] and, except for California Portland's alternative computation which *is* raised by cross-appeal, provided California Portland with the precise amount of refund requested. As stated by this Court, ". . . an appeal lies from a judgment, not from findings. . . . In order that a judgment be appealable at the behest of a party, the party must be aggrieved by it." *United States v. Adamant Co.*, 197 F.2d 1 (9th Cir. 1952).

Implicit in the Government's position is the contention that a notice of appeal must specify not only the judgment appealed from, but also the alleged subsidiary errors of the trial court. Although it is not in accordance with law, we are willing to submit to this view, provided the Government is similarly bound. In such case, however, the Government has no standing to make any argument on the merits to this Court, because its notices of appeal specified only the judgments (as distinguished from the numerous factual and legal rulings) which were adverse to it.[8]

C. The Government's Substantive Attempt to Avoid Collateral Estoppel.

1. *The alleged differences in the facts.* The Government's first claim is that there is not a requisite identity of facts between the 1951-52 Case and the present case.[9] In this connection, it appears to argue that for collateral estoppel to apply to *any* issue which is common to the two cases, all of the facts and all

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[7]See n. 40, *infra*.

[8]No. 22397, I-R. 163; No. 22398, I-R. 238.

[9]Gov't. Cl. Br. 8-10.

of the issues in the two cases must be identical.[10] This, of course, is not the law. It is well established that collateral estoppel can apply to a single common issue between two cases, even if all other facts and issues are different and collateral estoppel is inapplicable to such other facts and issues. See, e.g., *Commissioner v. Sunnen,* 333 U.S. 591, 598 (1947); 1B MOORE, FEDERAL PRACTICE 3851-53 (1965).

The Government states that the present case involves "two sites, Colton and Mojave,"[11] while the 1951-52 Case involved only Colton. If this distinction has meaning, it still does not affect collateral estoppel as to the depletion computation at Colton (which represents the major part of the amount now in controversy). As discussed in our opening brief,[12] the Colton Quarry is common to both the 1951-52 Case and this case, and the facts relevant to its depletion computation were no different in 1953-59 than in 1951-52.

In addition, the operations and pertinent facts at Mojave and Rillito were the same as at Colton during 1951-52,[13] and therefore the depletion computation applicable to Colton should also be applicable to the other two quarries, either by collateral estoppel or by *stare decisis.*[14] The Government itself recognizes this in its identical treatment of the three quarries in all of its arguments.[15]

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[10]*Id.* at 9-10.

[11]*Id.* at 9.

[12]E.g., C.P.C. Op. Br. 8-9.

[13]No. 22397, I-R. 81, 125-26; No. 22398, I-R. 117, 185-86.

[14]See, e.g., C.P.C. Op. Br. 22-24.

[15]See also the Government's admission that: "The material facts and documents in each of these cases are substantially identical." Gov't. Op. Tr. Br. 3, n. 1.

The second allegation of difference is that "the District Court did *not* find (as it did with respect to some issues) that the facts and circumstances relevant to handling additives were the same in both cases."[16] This is not only inaccurate,[17] but it is also irrelevant, because we do not contend that the Government is collaterally estopped on this one *de minimus* point.

The final allegation of factual difference between the two cases is the Government's claim that California Portland's cash discount practices were not the same in 1953-59 as they were in 1951-52.[18] The District Court expressly found to the contrary,[19] pursuant to the uncontroverted testimony of California Portland's controller.[20] The Government's contention that this finding was "clear error" is unsupported by any evidence of change in discount practices between the two periods.

2. *The claimed settlement.* The Government next claims that the entire judgment in the 1951-52 Case was a compromise, "with a reservation of the Government's right to relitigate."[21] The complete disregard of the facts surrounding this assertion has been fully discussed in our opening brief.[22] This is also evident from the two quotations cited in the Government's

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[16]Gov't. Cl. Br. 9.

[17]The District Court followed the treatment of such handling costs adopted in the 1951-52 Case, and specifically found that the relevant facts pertaining to production of cement were the same in 1953-59 as in 1951-52. E.g., No. 22398, I-R. 185-86.

[18]Gov't. Cl. Br. 9-10, n. 4.

[19]No. 22398, I-R. 185-86; No. 22397, I-R. 125.

[20]*Id.* at 98-99.

[21]Gov't. Cl. Br. 5, 9, 11, 12, 13.

[22]C.P.C. Op. Br. 9-18.

own brief. The first such quotation (of the Government's own counsel) expressly recognizes:

> "*If the collateral estoppel principle is against us,* it will be as a matter of law rather than by my agreement."[23] (emphasis added)

Clearly the Government's counsel was aware that the final judgment in the 1951-52 Case could be the basis for collateral estoppel in a future proceeding, "as a matter of law."

The Government's second quotation (from the stipulation to re-entry of the unappealed 1962 findings and conclusions) describes the usual status of a judgment entered after judicial determination of a controversy. In such case, the losing party does not by the entry of judgment "[waive] his objection thereto nor . . . concede the correctness thereof [,] either for the taxable years in suit or subsequent taxable years."[24] Instead he is free to directly attack the judgment by appeal,[25] or, in certain limited circumstances, by a collateral attack in a separate proceeding. It is only where his agreement does waive his objections and does concede the correctness of the judgment that the case is settled by compromise.[26] It should therefore be beyond controversy that the only point "compromised" in the 1951-52 Case was that of the handling costs of pre-kiln additives.

3. *The claimed changes in the law.* The Government's main assertion against collateral estoppel is that

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[23]Gov't. Cl. Br. 11.

[24]*Ibid.*

[25]As occurred here. See Pltf. Ex. 10.

[26]See, e.g., *Swift & Co. v. United States,* 276 U.S. 311, 323-24 (1927).

there have been "intervening changes in the law"[27] since the judgment in the 1951-52 Case. This argument contains, *inter alia,* the following errors:

(i) The premise that "the pertinent changes are those occurring after October 8, 1962."[28] This ignores the two appeals to this Court after that date, the fact that a final decision was not obtained until February 16, 1965, and the Government's own position that the 1965 judgment controls for collateral estoppel purposes because it was a "compromise."

(ii) The premise that only a "subtle change"[29] in the law will prevent collateral estoppel. If this were true, a litigant could almost always show such a "subtle change" by a slightly different result in some other forum somewhere, and the doctrine of collateral estoppel would not exist. As discussed in our opening brief,[30] the actual requirement stated by the courts is "a decisive change in the law"[31] and "an intervening legal development . . . which makes manifest the error of the result reached . . . [in the earlier case]."[32] The cases cited by the Government affirm this standard.[33]

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[27]Gov't. Cl. Br. 12-21.

[28]*Id.* at 12.

[29]*Id.* at 7.

[30]C.P.C. Op. Br. 19-20, n. 51.

[31]*Lynch v. Commissioner,* 216 F.2d 574, 580 (7th Cir. 1954).

[32]*Commissioner v. Sunnen,* 333 U.S. 591, 603 (1948).

[33]In *Sunnen,* the landmark *Clifford-Horst* line of decisions had greatly altered the tax law of intra-family transactions between the date of the judgment claimed to have collateral estoppel effect and the second suit. In *McCall v. Commissioner,*

(This footnote is continued on the next page)

(iii) The allegation that the law is now different from that applied in the 1951-52 Case.[34] Assuming *arguendo* that the relevant date is October 8, 1962, the first alleged change[35] is *Riddell v. Monolith Portland Cement Co.*, 371 U.S. 537 (1963). *Monolith* held that cement producers could not use their end product as the depletion base, because *Cannelton* was applicable to them. This was exactly the principle on which the 1962 judgment in the 1951-52 Case was based. The parties recognized the applicability of *Cannelton* on the first appeal of the 1951-52 Case, and the 1962 judgment was entered pursuant to this Court's instructions for the District Court to formulate a depletion computation using the same kiln feed depletion base applicable here. *Riddell v. California Portland Cement Co.*, 297 F.2d 345, 355, (9th Cir. 1962).

The Government then cites four cases without comment. They are not pertinent and are discussed by footnote.[36]

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312 F.2d 699 (4th Cir. 1963), the first case determined that the taxpayers had a depletable interest under a lease, without considering the effect of a 30-day cancellation clause. Thereafter the Supreme Court held that such a cancellation clause was controlling and precluded the right to depletion. In *CBN Corporation v. United States*, 364 F.2d 393 (Ct. Cl. 1966), *cert. denied*, 386 U.S. 981 (1967), the court stated that its own intervening *Tidewater* decision had made "a marked alteration in approach to the problem at hand" and a "change of course in our approach to depletion matters." 364 F.2d at 396.

[34]"In sum, the state of the law and legal climate is vastly different today from its state in 1962." Gov't. Cl. Br. 21.

[35]Gov't. Cl. Br. 14-15.

[36]The four cases (cited at pp. 15-16) are *United States v. Portland Cement Co. of Utah*, 315 F.2d 169 (10th Cir. 1963);

(This footnote is continued on the next page)

The remaining cases cited by the Government are *Standard Lime* and *Whitehall.* These are discussed in our opening brief and, as established there,[37] support the 1951-52 Case computation far more than the Government's present litigation theories.

(iv) Finally, the Government neglects to mention that the great weight of authority supports the 1951-52 Case computation.[38]

D. Miscellaneous Misstatements by the Government.

Among the many other inaccuracies in the Government's closing brief are the following:

1. The amazing statement that nothing in the record supports our "assertion" that the District Court followed the depletion computation formulated in the 1951-52 Case.[39] The applicability of the 1951-52

United States v. Longhorn Portland Cement Co., 328 F.2d 491 (5th Cir. 1964); *United States v. Light Aggregates, Inc.*, 343 F.2d 429 (8th Cir. 1965); and *Solite Corporation v. United States*, 375 F.2d 684 (4th Cir. 1967). The issue in each was whether the taxpayer's depletion base was its finished end product or an earlier stage of production. As stated in the text, California Portland's depletion base was established at the kiln feed point prior to both the 1962 and 1965 judgments, and therefore these cases also constituted no "change in the law" applicable to said judgments.

The Government also cites two subsequent opinions in the *Portland of Utah* litigation, appearing at 338 F.2d 798 (1964) and 378 F.2d 91 (1967). Such opinions involved the question of whether the proportionate profits method of Reg. 118 was applicable, and eventually concluded it was. This, of course, was exactly the method applied in the 1962 and 1965 judgments in the 1951-52 Case.

[37]See, e.g., C.P.C. Op. Br. 60-62.

[38]*Id.* at 25-67.

[39]Gov't. Cl. Br. 6, n. 3.

Case computation was our principal argument below, as it is here. The District Court's computation is identical in every detailed particular (except for dollar amounts) with the method established in the 1951-52 Case.[40]

2. The statement that after the alleged "compromise" judgment in the 1951-52 Case, "an appeal was never intended, authorized or docketed."[41] The Government's Notice of Appeal is in evidence as Pltf. Ex. 10, as is the Government's "Motion for Extension of Time to Designate Record and Docket Cause on Appeal and Order."

3. The surprising statement that the "first marketable product" is not the starting point for the Regulation 118 computation.[42] This ignores the express language of the Regulation, which could not be more explicit:

> ". . . [T]here shall be used . . . the representative market or field price *of the first marketable product* resulting from any process or processes . . . minus the costs and proportionate profits attributable to the . . . processes beyond the ordinary treatment processes." (emphasis added)

It also ignores the Government's own position in its opening brief that California Portland's "first marketable product"[43] was *both* bulk and sacked cement.

4. The assertion that *Standard Lime* and *Whitehall* "are in accord" on the treatment of bags and bagging.[44]

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[40]No. 22397, I-R. 88; No. 22398, I-R. 128; C.P.C. Op. Br. 5, n. 16.

[41]Gov't. Cl. Br. 12, n. 5.

[42]*Id.* at 25.

[43]Gov't. Op. Br. 34.

[44]Gov't. Cl. Br. 24.

In its discussion of *Standard Lime,* the Government states that the Court of Claims held that sacking costs were "non-mining costs in their entirety."[45] It fails to recognize, however, that this does not answer the depletion computation question. If a miner of calcium carbonates sold one-half of its production as bulk cement and used the other half to construct buildings which it then sold, obviously the construction costs would be "non-mining." It is also obvious, however, that such construction costs should not be placed in the denominator of the depletion computation. Instead, the Regulation expressly requires that the computation be developed from the "first marketable product." This is exactly what was done in *Standard Lime,* and there the incremental costs and revenues of the *subsequent product* of sacked cement were eliminated in exactly the same manner as that of the court below.[46]

5. The contention that certain authorities cited in our opening brief with respect to sacking are not in point because "they involve determinations, with respect to unintegrated miners, as to their 'commercially marketable * * * product' of mining processes."[47] If the courts eliminate the incremental costs and revenues of sacking in determining the "commercially marketable product," this result is *a fortiori* where the Regulation expressly requires reference to the "*first* marketable product."

6. The statement that California Portland's alternative computation is "untimely" and seeks "entirely

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[45]*Id.* at 17.

[46]Pltf. Ex. 1; C.P.C. Op. Br. 60-61.

[47]Gov't. Cl. Br. 26.

different relief."[48] The relief sought in this case is a depletion computation which the Government will be required to accept. Our basic position is that the method established for 1951-52 remains applicable to 1953-59. When the Government introduced new computation theories at the trial, it clearly was not "untimely" or "different relief" for California Portland to contend that if the 1951-52 Case was not followed, the Government's computations are not the only alternative.

Respectfully submitted,

JOSEPH D. PEELER,
STUART T. PEELER,
PETER C. BRADFORD,
MUSICK, PEELER & GARRETT,
Counsel for California Portland Cement Company.

June, 1968.

[48] *Id.* at 5, 31.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER C. BRADFORD